NO. 114

In the Supreme Court of the United States

J. T. McCarthy, Jr., Doing Business as Hercules Supply Company, and G. L. Meholin,
Petitioners,

VERSUS

H. C. Wynne, and American Exchange Bank of Henryetta, Oklahoma,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

REPLY BRIEF OF PETITIONERS

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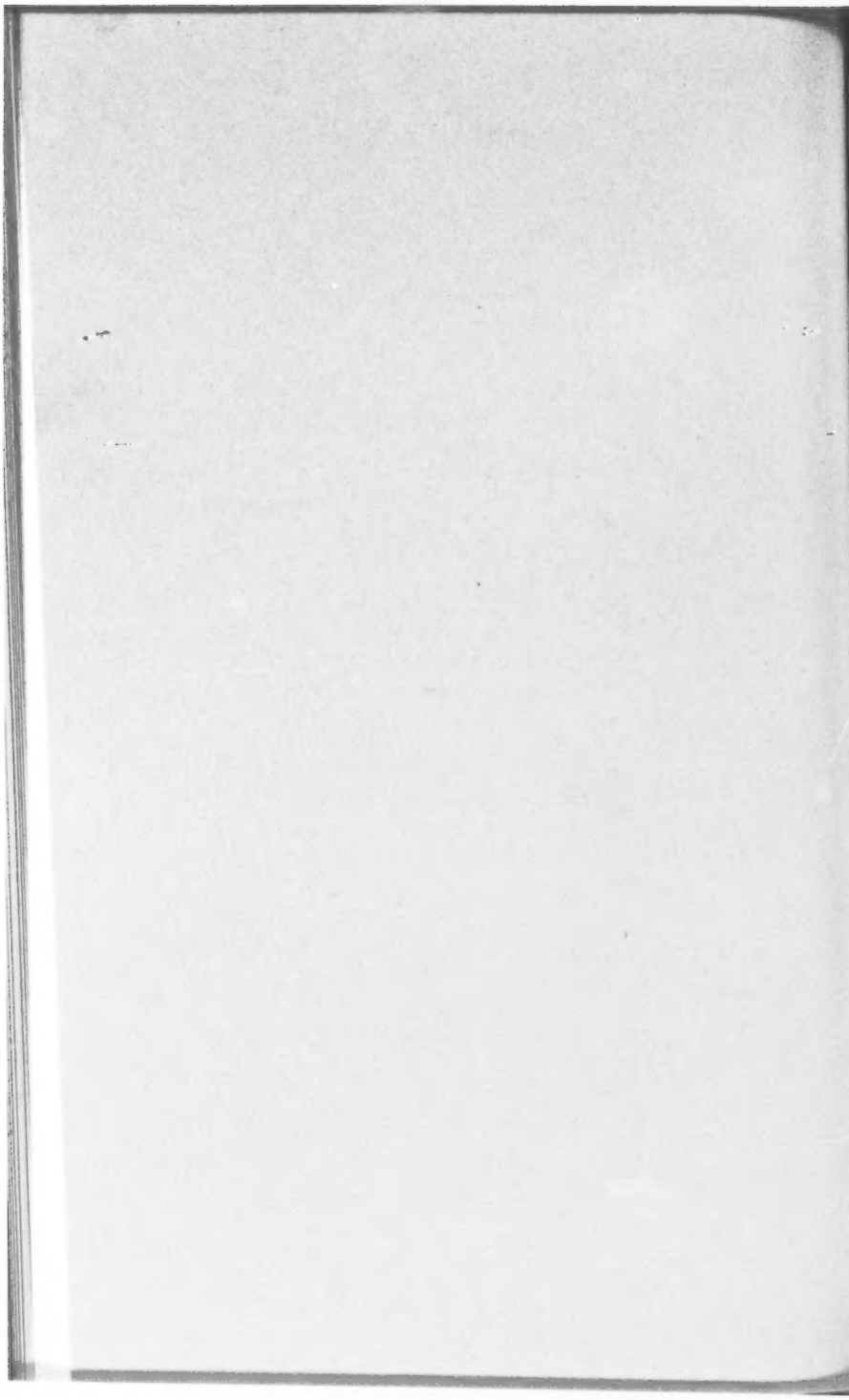
October, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.



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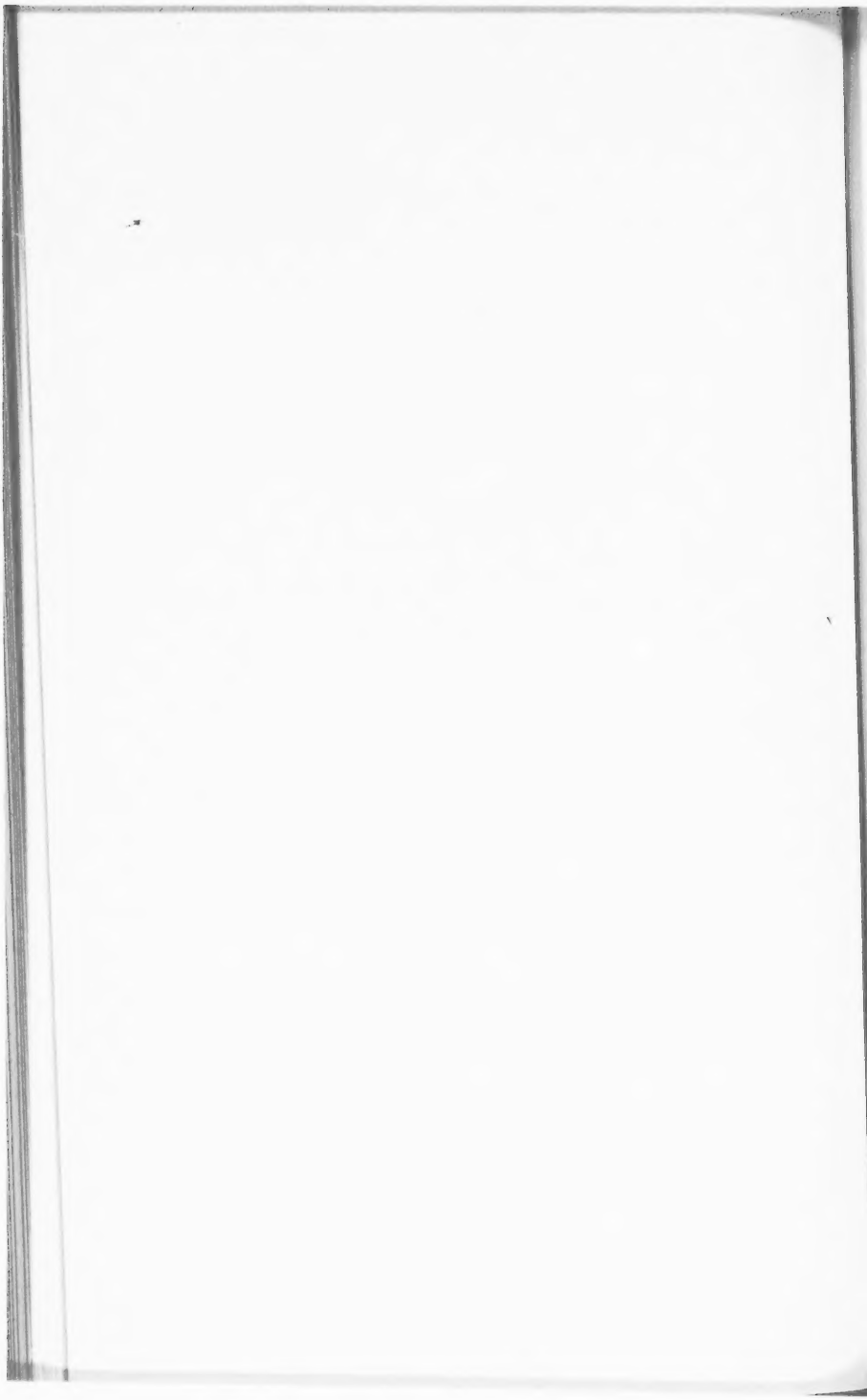

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Pursuant to authority of Subsection (a), Section 4, Rule 38, of the Revised Rules of this Court, petitioners in aid of the Court desire to briefly reply to the brief of respondents in opposition to petition for certiorari.

First. Reply to Respondents' Point I.

The whole of respondents' Point I is predicated on the premise that inasmuch as the action originated as a suit in equity, the mandate on first appeal, the interpretation thereof, and the rights of the parties following the first appeal are governed by rules applicable to mandates and further procedure in equity cases. They wholly disregard the

fact that when the Circuit Court of Appeals on first appeal determined that Wynne was not entitled to the equitable relief originally sought based on the written contract, but that instead his remedy was for money judgment in conversion or on implied contract arising out of conversion (for which Wynne had an adequate remedy at law), and granted him leave to amend his petition, equity lost jurisdiction and the further proceedings and rights of the parties would be those applicable to an action at law.

Cases holding that under the circumstances last named equity loses jurisdiction, and that the further proceedings and rights of the parties are those applicable to actions at law and not suits in equity are cited in petitioners' brief in support of petition for certiorari under Point B, Proposition I.

Cases holding that the remedy of conversion or on implied contract growing out of conversion is one at law and not in equity are cited in petitioners' brief in support of petition for certiorari under Point A of Proposition I.

Respondents rely upon the decision of this Court in the case of *Twist* v. *Prairie Oil & Gas Co.*, 27 U. S. 684, 71 L. ed. 1297, as holding that once having been tried in equity and appealed as an equity case, the Court was powerless to thereafter treat the case as anything but a suit in equity.

Such was not the holding in the Twist case. There this Court merely held that in a suit brought, tried, and appealed as an equity case, the Circuit Court of Appeals must either review it as an equity case, if properly in equity, or if not properly in equity, then to dismiss or remand it with

the right in plaintiff to retry it as a law action; that the Appellate Court could not treat such an action as having been tried at law, when in fact it had not been, and thus proceed to decide the case on its merits. The opinion in that case is strongly in support of petitioners' contention herein that when the Court on first appeal determined that Wynne was not entitled to the relief first sought but that his remedy was one cognizable at law, when the case should have been, and in fact was, remanded to the court below to be there recommenced and proceeded with as an action at law entitling McCarthy to a new trial.

Respondents further contend that, inasmuch as petitioners in the first instance stipulated that the case prior to first appeal was properly on the equity docket and without objection tried the case as an equity case, they were estopped following the decision on first appeal to claim that the suit was no longer in equity. In support of this contention respondents cited *Lyons Milling Co.* v. *Goffe & Carkener* (10th C. C. A.), 46 Fed. (2d) 241.

Respondents overlook the fact that prior to first appeal the case was properly a suit in equity. Wynne attempted to state a cause of action cognizable by a court of equity. He sought equitable relief. This, under the rule stated in *Twist* v. *Prairie Oil & Gas Co., supra,* characterizes the suit as one in equity, notwithstanding the fact that it was later determined from the evidence that Wynne was not entitled to the relief sought. It was not until the Circuit Court of Appeals on first appeal (based on the evidence and not the pleadings) denied the relief thus sought and held that Wynne's remedy should be that of conversion or on implied

contract arising out of conversion, cognizable at law, that equity lost jurisdiction and the character of the action changed from that of a suit in equity to an action at law. Immediately, then, upon the amendment to Wynne's petition to state a cause of action at law rather than in equity, McCarthy filed his demand for a jury trial as in law actions. At that time the new Federal Rules of Civil Procedure were in effect and a motion to transfer the case to the law side of the court would have been out of order. How, under these circumstances, can it be said that McCarthy's recognition of the suit as one in equity, at a time when, because of the nature of the relief asked, it was properly a suit in equity, estop him from claiming rights guaranteed him in a law action after the nature of the case has been changed to that of a law action? In the *Lyons Milling Company* case, *supra,* as well as in the cases therein cited, the issues and the nature of the action remained the same throughout the litigation and there was no question regarding any change in the nature of the action between the time the question of equity jurisdiction was raised and the time the court held it should have been raised.

Based then on the false premise that because the action originated in equity, or that McCarthy was estopped to question the equity jurisdiction, respondents under Subsection (c) of their Point I discuss and cite authorities applicable to equity mandates.

Petitioners have no quarrel with the general rules thus announced with respect to equity mandates, except that they have no application here. Equity lost jurisdiction

The action thereafter was one at law. Rules, procedure, and rights applicable to law actions then prevailed.

Even, however, in the case of an equity mandate, where the pleadings are amended and a new theory of liability is presented, as in this case, the parties should be entitled as a matter of equity to a new trial, at least as to such new theory of liability. Respondents cite no cases in which there was a change in the issues and the theory of recovery before and after the appeal.

The claim is made (Resp. Br. pp. 15-16) that since there can be no question but that McCarthy received the goods, the only possible remaining question to be retried would be that of the value of the goods. His pleadings admit this fact. But a suit asking that he in equity account for such goods under the provisions of a written contract upon which both parties are relying, being the theory of recovery prior to first appeal, and an action predicated on conversion of the goods at a particular time and place, being the theory of recovery after first appeal, constitute two separate and distinct lawsuits. In the one the defendant would not be called upon or have the opportunity of presenting defenses that he might have to the other. McCarthy has never had a trial in which he was called upon or permitted to try the issue of conversion, and yet he now finds himself subject to a judgment for conversion. He was most certainly entitled to a trial of the issue of conversion.

The only allegation of plaintiff's petition prior to first appeal that might in any way suggest the idea of conversion was the allegation contained in paragraph 10 (N. R. 230),

wherein it was alleged that plaintiff being unable to secure a satisfactory accounting from the defendant, "on or about the 6th day of December, 1930, requested that he be allowed to recover possession of any unsold property," and that at that time McCarthy through his attorney refused such request except upon certain conditions he had no right to make. Even based on this allegation Wynne did not ask for judgment as for conversion, but simply claimed that McCarthy thereby became obligated to account for the unsold goods under the 85% provision of the contract rather than on the split 75% and 85% provisions. Assuming, however, that the allegation last above referred to was in fact an allegation of conversion, such allegation of a refusal to return unsold goods in December, 1930, as constituting the conversion, is a far cry from the allegations of the amended petition after first appeal (N. R. 234) that all the goods were converted in February, 1925, because of having been placed in McCarthy's stock and offered for sale in the usual course of trade. Different facts, different alleged acts of conversion, different dates, and different circumstances altogether. Yet respondents say that the only issue to be tried after the first appeal is the question of value.

We would earnestly ask of the Court that it not simply rely upon the conflicting statements of counsel but that it turn to N. R. pages 223 to 234, and read the petition on which the case was tried prior to first appeal, and then read the amendment to the petition following the first appeal, shown at N. R. pages 234 and 235. The Court cannot do this without saying that the theory of liability upon which Wynne sought recovery against McCarthy following the

first appeal and upon which the second judgment has been entered against McCarthy is entirely different than the theory of recovery at the first trial and upon which the first judgment was entered. If a reading of the petitions alone is not sufficient to satisfy the mind of this Court, we would respectfully ask that it turn to N. R. pages 202 to 205, where the various statements made by counsel for Wynne throughout the litigation with respect to the differences in the issues and the theory of the lawsuit before and after the first appeal are collected.

But one conclusion can be reached.

The Court may ask what defense could McCarthy have to the amended complaint charging conversion. Since the question of conversion has never been tried and no record made as to that issue, a discussion of McCarthy's defenses thereto would be beside the point here. That is what he is asking, an opportunity to present his defenses to the issue of conversion. Suffice to say, the record as made, sketchy as it is with respect to conversion, reflects several such defenses.

Second. Reply to Respondents' Point II.

Subsection (a) of respondents' Point II is a reiteration of the claim that there was no change in the character of the issues and of the action before and after the first appeal. This has been covered in our reply to respondents' Point I.

Under Subsection (b) of Point II, respondents urge

five reasons why they claim the action after the amendment was still a suit in equity.

Reason 1 (p. 20, resp. br.) assigns as a ground of equity jurisdiction the existence of an alleged fiduciary relationship. Reason 2 (p. 21, resp. br.) says fraud was charged. Reason 3 (p. 21, resp. br.) asserts that the suit is in the nature of a creditor's bill. Reason 4 (p. 22, resp. br.) recites that mutual accounts were involved. Reason 5 (p. 24, resp. br.) sets out that the account is long and complicated.

All of these reasons are disposed of by the authorities cited in the brief in support of the petition under Point A, Proposition I. Illustrative of the principle involved in the statement by this Court in the case of *Buzard* v. *Houston*, 119 U. S. 347, 30 L. ed. 451, as follows:

> "*In cases of fraud or mistake, as under any other head of chancery jurisdiction,* a court of the United States will not sustain a bill in equity to support only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received."

It is the nature of the relief asked that controls and not the incidental presence of elements that under other circumstances might be made the basis of equitable recovery.

Here following first appeal the only relief sought was a simple money judgment.

There is no merit to respondents' Reason 3, namely, that the suit is in the nature of a creditor's bill.

It is true that Wynne sought to and did attach a small lease interest of record in the name of G. L. Meholin, as alleged in paragraph 14 of the petition (OR 10), belonged to the defendant McCarthy, and that by reason thereof Meholin was made a party defendant. No issue was ever made of this feature. The oil payment contract standing in the name of McCarthy, referred to in the same paragraph of the petition and which was likewise attached, was amply sufficient to satisfy any and all amounts which might be found to be due plaintiff. Meholin was merely carried as a nominal party.

The petition does not purport to constitute a creditor's bill.

Appellees own authorities negative their present contention in this regard. See also *Hamilton* v. *Penny* (5th Cir.), 58 F. (2d) 761; *Ziska* v. *Ziska,* 20 Okla. 634, 95 Pac. 254; 21 C. J. S. 1082, sec. 45, notes 71-72; 14 Am. Jur. 698, sec. 39; *Stewart* v. *Manget* (Fla.), 181 So. 370. These authorities, including those cited by appellee, all set forth the requirements and exceptions with respect to creditor's bills, namely, (a) first exhausting legal remedies; (b) the fraudulent character of the conveyance to some third person which plaintiff seeks to have set aside; (c) first reducing the indebtedness of plaintiff to judgment; (d) showing that the debtor had no other property subject to attachment or garnishment; and (e) numerous other prerequisites of a creditor's bill. In the instant case the petition itself shows that McCarthy had other property standing in his own name subject to attachment, and which was in this very

case attached. An almost identical situation is presented in the Florida case of *Stewart* v. *Manget, supra.*

Third. Reply to Respondents' Point III.

Respondents contend that the stipulation waiving a jury on the first trial was in fact a contract instead of a stipulation within the meaning of the rule announced by the authorities cited by petitioners in their brief in support of the petition under Proposition II (petrs. br. pp. 31-33). Whether called a stipulation or a contract, the effect, so far as the rule announced in said cases is concerned, is the same. The case of *Burnham* v. *North Chicago Street R. R. Co.*, 88 Fed. 627, does not purport to distinguish between a stipulation waiving a jury and a contract waiving a jury, as respondents would have this Court to believe. What the court in substance said was that agreements dealing with the waiver of a jury in a legal proceeding subject to the control of the court, whether called agreements, stipulations, or contracts, are not like other contracts. A simple stipulation whereby two adverse parties each agrees to waive a jury is just as much a contract between the parties as if such stipulation or agreement contained numerous other considerations.

Counsel for respondents in their brief (resp. br., p. 26) contradict our statement to the effect that the stipulation or contract involved in the case of *Burnham* v. *North Chicago Street R. R. Co., supra,* involved mutual agreements other than the waiver of a jury trial. We too ask the

Court to refer to the stipulation involved in that case (88 Fed. at p. 627). The stipulation there involved was in writing. It not only provided for the waiver of a jury trial, but provided for the submission of the case upon an agreed statement of facts. This constituted a mutual contract or agreement just as much as did the stipulation in the instant case. The mere fact that the things agreed to in the stipulation in the Burnham case are different from the things agreed to in the stipulation in the instant case would make no difference.

We further point out to the Court that even though a contract between two parties is to be considered something different that a stipulation between such parties, nevertheless, even in the case of a contract, it must be treated and regarded in the light of the considerations for which it was made. The stipulation in this case (NR 8) recited as a consideration for such stipulation the fact that the case was at that time properly on the equity docket, by reason of which fact neither party had a right to a jury trial. The parties might be willing to waive a jury in an action for accounting based on a contract upon which both parties relied, whereas the defendant would not be willing to waive a jury in a case wherein he is charged with conversion, a tort, or with liability arising out of such tort. It certainly cannot be said that a plaintiff can induce a defendant to sign a stipulation or a contract waiving a jury in a case presenting certain issues, and then amend his petition so as to proceed upon entirely different issues and expect to enforce such original stipulation or contract. The attorney

for respondents, by affidavit filed with the stipulation as an exhibit attached to the motion for the appointment of the Special Master, stated under oath (OR 47) that "This suit is brought upon a written contract by the terms of which" etc. Thus it is clear that the parties were waiving a jury in a contract action for an accounting and did not have in mind any waiver of a jury in a tort action.

The other matters referred to in respondents' Point 3 are fully covered in petitioners' principal brief.

Respectfully submitted,

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October, 1942.